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In The

Supreme Court of the United States

October Term, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

LEROY HENDRICKS,

Cross-Petitioner,

v.

STATE OF KANSAS,

Cross-Respondent.

On Writ of Certiorari to the
Supreme Court of Kansas

BRIEF OF AMICUS CURIAE STATE OF WISCONSIN IN SUPPORT OF PETITIONER AND CROSS-RESPONDENT

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QUESTION PRESENTED

Do sexually violent person commitment statutes that provide for the involuntary civil commitment of dangerous sexual offenders, who suffer substantiated mental disorders at the time of their scheduled release from prison, impose punishment within the meaning of the constitutional Double Jeopardy and Ex Post Facto prohibitions?

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BRIEF OF AMICUS CURIAE STATE OF WISCONSIN IN SUPPORT OF PETITIONER AND CROSS-RESPONDENT

INTEREST OF THE AMICUS

This brief is submitted by amicus through the Attorney General of Wisconsin in accordance with Rule 37.4 of the Rules of the Supreme Court with respect to the Double

Jeopardy and Ex Post Facto issues raised by the cross-petitioner.

Wisconsin has enacted legislation similar to the Kansas statute at issue,[1] which permits the state to involuntarily commit mentally disordered, dangerous, sexually violent persons.[2] This case concerns whether the Double Jeopardy Clause or the Ex Post Facto Clause renders unconstitutional the involuntary mental commitment of a person who has been convicted of and has served a prison term for a sexually violent offense, where the involuntary mental commitment is based on the person's current mental condition that makes the person likely to commit sexually violent offenses and who is dangerous because he is likely to commit such offenses.

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[1]The Wisconsin Supreme Court rejected challenges comparable to the challenges raised in this case and upheld the constitutionality of Wisconsin's sexually violent person commitment statute, which is similar to the Kansas statute in material respects, in *State v. Carpenter*, 541 N.W.2d 105 (Wis. 1995), and *State v. Post*, 541 N.W.2d 115 (Wis. 1995). As a result of these decisions, Wisconsin currently has three cases pending before this Court: *William A. Schmidt v. Wisconsin*, No. 95-8131; *William E. Marberry v. Wisconsin*, No. 95-9308, and *Samuel Post and Ben Oldakowski v. Wisconsin*, No. 95-8204.

[2]Wisconsin's statute and the statutes enacted by other States share critical features and are comparable in relevant respects to the Kansas law. The terminology of the statutes varies, but those differences are not significant to the constitutional issues. For example, the Kansas law is titled "The Kansas Sexually Violent Predator Act" and the Wisconsin law is titled "Sexually Violent Person Commitments." The Kansas statute uses the term "mental abnormality" and the Wisconsin statute uses the term "mental disorder." For convenience sake, this brief will use the terms "sexually violent person commitment statutes" and "mental disorder."

The States have the authority and duty to exercise their police power to incapacitate and treat mentally disordered, dangerous persons in order to protect the community from such persons. This case presents the question whether the United States Constitution prohibits the States from enacting the protective method chosen by Kansas and other States which have enacted sexually violent person commitment statutes. The Court's analysis of whether these statutes impose unconstitutional punishment or constitute a prohibited successive criminal proceeding will directly affect the States which have enacted or are contemplating enacting such statutes. The analysis may also affect other legislative measures or governmental conduct alleged to violate the Double Jeopardy and Ex Post Facto Clauses. Wisconsin also supports the position and arguments presented in the brief of amici curiae filed by the State of Washington on the substantive due process issue.

SUMMARY OF ARGUMENT

State statutes that are designed to protect the public from mentally disordered, dangerous, sexually violent persons and to treat such persons for their disorders and the conduct related to the disorders; whose provisions are reasonably related to those remedial, nonpunitive purposes; and that are not excessive in relation to those purposes, do not impose punishment within the meaning of the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution.[3] These statutes are involuntary mental commitment statutes in purpose and in critical form and structure. Like other involuntary mental

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[3]If the statute does not impose punishment for purposes of the Double Jeopardy Clause, it will not impose punishment for purposes of the Ex Post Facto Clause. Accordingly, the Ex Post Facto Clause will not be separately addressed at length in this brief.

commitment statutes, they are enacted pursuant to the State's police power authority to protect the public and to treat the dangerous, mentally disordered. These involuntary mental commitment statutes do not constitute impermissible punishment simply because the statutes apply to persons who have already been prosecuted and convicted and have served sentences for sexually violent offenses which occurred before enactment of the statute. The purpose of these statutes is not to punish for past or future acts, but to regulate a present situation by incapacitating and treating those whose mental conditions make them dangerous to the public.

These civil commitment statutes do not impose punishment simply because they deprive individuals of liberty. Nor are commitments under such statutes converted to punishment simply because States have chosen to afford these individuals many procedural due process protections associated with the criminal trial process. Commitment under these statutes is not punishment simply because commission of a sexually violent offense is one prerequisite to the applicability of the statute. The function of a predicate act of sexual violence under the commitment scheme is not to punish that past act. The past act, along with current diagnosis and treatment history, is evidence of the person's present mental condition and dangerousness. A past offense is a prerequisite only because it identifies the persons who are most dangerous and most at risk to commit future offenses. It also ensures that persons who only fantasize about, but do not commit, violent sexual acts will not be covered by the law.

These statutes are designed to serve important and legitimate nonpunitive governmental goals. They are not so punitive in purpose or effect so as to negate these goals. The presence of some deterrent effect and the fact the statutes have some connection to criminal activity falls short of the clear proof necessary to show the statutes are

criminal or punitive. The provisions of these statutes are reasonably related to the legitimate, nonpunitive goals they are designed to serve and are not excessive in relation to those goals. Thus, commitment under these statutes does not constitute punishment within the meaning of the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution.

This Court should approach the constitutional questions presented with full cognizance of, and respect for, the States' prerogatives in making policy and value judgments about effective ways to protect their citizens from sexual violence. It is this Court's delicate task to ensure that it fulfills its fundamental duty to enforce the Constitution without substituting its conceptions of wisdom or propriety for that of the state legislators who enacted the laws and of the citizens who elected them.

These statutes do not violate the core values protected by the Double Jeopardy and Ex Post Facto Clauses. Accordingly, the statutes are constitutional and challenges to them must be rejected by this Court.

ARGUMENT

INVOLUNTARY COMMITMENTS OF MENTALLY DISORDERED, DANGEROUS SEXUAL OFFENDERS WHO HAVE COMPLETED PRISON TERMS, AFTER A TRIAL ON THE ISSUES OF MENTAL CONDITION AND DANGEROUSNESS ACCOMPANIED BY SUBSTANTIAL DUE PROCESS PROTECTIONS, DO NOT VIOLATE THE DOUBLE JEOPARDY OR EX POST FACTO CLAUSES OF THE CONSTITUTION.

A. In Reviewing The States' Exercise Of Police Power, This Court Does Not Substitute Its Own Value And Policy Judgments For Those Of The States.

In reviewing sexually violent person commitment statutes, this Court must be mindful of the fact that the States have primary authority to enact measures to deal with dangerous, mentally disordered persons and that this Court can intervene only if the States' chosen method violates a constitutional provision.

There is no constitutional basis for this Court to declare that the States cannot constitutionally make the following policy determination: sexually violent offenders should be punished for their crimes; the pain of punishment and experience of prison (including rehabilitation programs and treatment) will enable most offenders to avoid committing sexually violent crimes when they are released; but some offenders, those who suffer mental disorders or abnormalities that make them especially high risk to reoffend, should be subject to involuntary civil commitment at the conclusion of their prison terms. There is no constitutional basis for decreeing that the States may impose involuntary mental commitment in lieu of punishment, but that they may not do so sequential to and in addition to punishment. There is nothing in the Double

Jeopardy Clause or the Ex Post Facto Clause that suggests, much less mandates, that one statutory system is constitutionally permissible and the other is not.

It is beyond dispute that the States have authority under their police power to protect their citizenry "from the dangerous tendencies of some who are mentally ill," *Addington v. Texas*, 441 U.S. 418, 426 (1979), and that such commitments are civil. *Allen v. Illinois*, 478 U.S. 364 (1986).

> The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. The particular fashion in which the power is exercised--for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity--reflects different combinations of distinct bases for commitment sought to be vindicated.

Jackson v. Indiana, 406 U.S. 715, 736-37 (1972) (footnotes omitted).

In the past, many States have had laws providing for civil commitment of dangerous, sexually disordered persons. Such statutes provided for involuntary civil commitment of persons charged with or convicted of sexual offenses who were found to have mental conditions that made them dangerous to the public. These statutes generally provided for commitment in lieu of punishment, but commitment could be extended beyond the maximum prison term which could have been imposed for the sexual offense. *See generally Humphrey v. Cady*, 405 U.S. 504 (1972).

The Kansas statute at issue here (and comparable statutes enacted in Wisconsin and other States) is different from the old form of commitment statute that provided for commitment in lieu of punishment. The new statutes provide for commitment for purposes of incapacitation and treatment following punishment. Under the new statutes, the State is not forced to choose between punishment and commitment. These new statutes have been challenged on double jeopardy and ex post facto grounds because they allow the State to convict and punish all deserving sexual offenders and then to civilly commit for purposes of incapacitative treatment those who have mental disorders that make them particularly dangerous to the public if allowed to go at large. These statutes permit commitment only after a trial, accompanied by substantial due process protections, at which the State must prove the mental condition and dangerousness beyond a reasonable doubt.[4]

Nonetheless, the statutes are challenged as violating the Double Jeopardy Clause on the theory that the commitment constitutes punishment and that the punishment is unconstitutional because it subjects the individual to a successive trial and punishment. Because these laws apply to persons who committed their predicate offenses before enactment of the statutes, challengers claim they violate the Ex Post Facto Clause because they make more burdensome the punishment for a crime after its commission.

This Court has already upheld the "commitment in lieu of criminal sentence" type of statute against a challenge that the statute imposed punishment without affording

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[4]Thus, these statutes do not suffer the constitutional infirmities identified in statutory schemes that permitted potential long-term commitment without adequate procedural protection and without proof of mental disorder and dangerousness. *See, e.g., Baxstrom v. Herold*, 383 U.S. 107 (1966); *Specht v. Patterson*, 386 U.S. 605 (1967).

guaranteed constitutional protections. *Allen v. Illinois*, 478 U.S. 364 (1986). But an *Allen*-type statute is not the only type of statute that is permissible.

For this Court to declare there is only one constitutionally acceptable type of commitment for the dangerous, sexually disordered would be to encroach on the policy and decisionmaking choices of the States, something this Court has repeatedly declined to do. *See Marshall v. United States*, 414 U.S. 417, 427 (1974); *Jones v. United States*, 463 U.S. 354, 364 n.13 (1983). In the involuntary commitment context, the legal concept of the degree--and manifestation or effect--of mental disorder sufficient to justify involuntary commitment, and the form that commitment should take, reflects society's "judgment on the basic policy question of the extent to which the state should interfere with the liberty of the individual in the interest of all." Henry Weihofen, *The Definition of Mental Illness*, 21 Ohio State L.J. 1, 9 (1960). Once a State has answered this basic policy question, the courts are not free to interfere absent compelling evidence of a constitutional violation.

Whether the statute evinces good or bad policy or constitutes a wise or foolish use of state resources is a concern for the legislature, not the courts. The very fact the legislature has enacted a particular law demonstrates that it concluded that other policy concerns outweighed those articulated by the critics. *See United States v. Hess*, 317 U.S. 537, 551-52 (1943).

Any constitutional infirmity in these statutes must be found in the words and purpose of the Constitution itself. In judging the constitutionality of the States' exercise of police power, the Court must not abdicate its duty to enforce the Constitution, but neither is it free to invalidate State policies with which it disagrees or to mandate its own moral code. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 849-50 (1992).

Proper judicial restraint, neither an abdication by the Court of its duty to enforce the Constitution, nor usurpation of the duties that belong to others, is indeed "the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., separate opinion). *See also Trop v. Dulles*, 356 U.S. 86, 119-20 (1958).

This Court has both the constitutional power and responsibility to check unconstitutional exercises of power by the executive and legislative branches of State and Federal government. But the only check against the unconstitutional exercise of power by the Court is its "own sense of self-restraint." *United States v. Butler*, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting), *quoted in Furman v. Georgia*, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting).

This Court must exercise that proper restraint in reviewing the commitment statute at issue here. "In a civil commitment state power is not exercised in a punitive sense." *Addington v. Texas*, 441 U.S. at 428. No constitutional principle or provision wrests this commitment power from the States. No constitutional principle or provision makes the exercise of the police power punitive here, when it is not punitive in any other civil commitment context.

> There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.

O'Connor v. Donaldson, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring). It is decidedly the province of the States to weigh and balance the medical, psychological, religious, philosophical, and moral views of the accountability of and proper response to those whose substantiated mental disorders repeatedly subject the

community and innocent victims to the risk and fear of sexual violence. *See Powell v. Texas*, 392 U.S. 514, 536-37 (1968) (plurality opinion).

The guarantee of individual freedom from governmental oppression that forms the core of the constitutional protections against Double Jeopardy and Ex Post Facto laws is not violated by sexually violent person commitment statutes. The Kansas statute and its like are constitutional and must be upheld.

B. Commitment Proceedings Under Sexually Violent Person Commitment Statutes Do Not Constitute Acts Of Governmental Oppression Of The Sort Prohibited By The Double Jeopardy And Ex Post Facto Clauses.

1. The Double Jeopardy and Ex Post Facto Clauses protect against governmental oppression without sacrificing legitimate governmental interests.

Because the cases coming before this Court have presented double jeopardy arguments in a wide variety of contexts, this Court's decisions present no unerring formula by which to test whether a legislative measure constitutes impermissible punishment or a successive criminal proceeding.[5] But this Court has repeatedly

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[5]Authors have offered many criticisms of, and suggestions for reconciling, the approaches the Court has taken to double jeopardy issues. A small selection includes: George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 Univ. Ill. L. Rev. 827; Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L.J. 1325 (1991); Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double*

articulated that the core value of the Double Jeopardy Clause is to protect against governmental oppression.[6] The Double Jeopardy Clause does not, however, prohibit the States from protecting legitimate societal interests. Incapacitative treatment is a legitimate societal interest. Sexually violent person commitment statutes that serve that nonpunitive purpose and are not excessive in relationship to that purpose do not represent governmental oppression.

The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. It protects the individual from governmental oppression without forfeiting society's legitimate needs.

Every proceeding subsequent to another is not necessarily "an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States v. Scott*, 437 U.S. 82, 91 (1978).

Jeopardy, 31 Am. Crim. L. Rev. 1 (1993); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795 (1992); Stanley E. Cox, Article, *Halper's Continuing Double Jeopardy Implications: A Thorn By Any Other Name Would Prick As Deep*, 39 St. Louis L.J. 1235 (1995); Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez, and Speiser Cases*, 34 Ind. L.J. 231 (1959); Peter Westen and Richard Drubel, *Toward A General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81; Brian L. Summers, *Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition*, 56 Ohio State L.J. 1595 (1995); Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 Washburn L.J. 1 (1983).

[6]Governmental action that is perceived as oppressive by the subject individual is not governmental oppression within the meaning of the Constitution. *Cf. Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 n.14 (1994).

The Double Jeopardy Clause defines the proper relationship between the individual and the State by prohibiting governmental action that constitutes governmental oppression. But the Constitution also accommodates the States' legitimate societal interests in protecting the community from those who commit violence. *See Garrett v. United States*, 471 U.S. 773, 796 (1985) (O'Connor, J., concurring). The Double Jeopardy Clause does not require the government to vindicate all its societal interests in a single proceeding. *See United States v. Jorn*, 400 U.S. 470, 483-84 (1971). Thus, the Double Jeopardy Clause also defines the proper relationship between the individual and the community. A second proceeding is not barred in some situations simply because to do so would be too high a price for society to pay. *Burks v. United States*, 437 U.S. 1, 15 (1978) (quoting *United States v. Tateo*, 377 U.S. 463, 466 (1964)). The Double Jeopardy Clause allows the States to create and use different measures to pursue a variety of legitimate societal interests. Successive proceedings, even successive criminal trials, are generally permitted.[7] They are prohibited only where a second trial would constitute an unconstitutionally oppressive use of the criminal process by the States. For example, a second criminal trial following acquittal is prohibited because the second trial itself is punitive. *See Burks v. United States*, 437 U.S. 1.

Similarly, the Ex Post Facto Clause "was intended to secure substantial personal rights against arbitrary and

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[7] *See United States v. Dixon*, 509 U.S. 688 (1993) (successive trial and punishment are not barred if offenses charged are not the same offense within meaning of Double Jeopardy Clause); *Burks v. United States*, 437 U.S. 1 (1978) (second trial barred if conviction reversed on appeal on grounds of insufficient evidence, but not if reversal is based on trial error); *Arizona v. Washington*, 434 U.S. 497 (1978) (second trial not barred after mistrial based on manifest necessity).

oppressive legislative action." *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915).

In *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), this Court clarified that the Ex Post Facto Clause means that "[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts" because it is oppressive to do so. The Ex Post Facto Clause only prohibits a law if it punishes as a crime an act previously committed, which was innocent when done; makes more burdensome the punishment for a crime, after its commission; or deprives one charged with crime of a defense available according to law at the time when the act was committed. *Id.* at 52. Laws which do not do one of these three specified things, but merely alter the situation of a party to his disadvantage, are not prohibited by the Ex Post Facto Clause. *Id.* at 47-52.

In both the Ex Post Facto and Double Jeopardy Clause contexts, the question is whether a legislative measure or successive governmental action constitutes punishment so as to be barred by either clause. At its core, the question is whether the challenged legislative measure or governmental action amounts to governmental oppression. A legislative measure or governmental action does not amount to governmental oppression if it is designed to serve nonpunitive goals, it bears a rational relationship to those goals, and it is not excessive in relation to those goals.[8]

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[8]*Cf. United States v. Halper*, 490 U.S. 435, 448-49 (1989) (civil penalty constituted punishment in particular case because it bore no rational relation to a remedial goal and was overwhelmingly excessive in light of goal).

2. Sexually violent person commitment statutes are designed to serve civil, nonpunitive, remedial goals; they bear a rational relation to those goals; and they are not excessive in light of those goals.

In *United States v. Ursery*, 116 S. Ct. 2135 (1996), this Court set forth an analysis for determining whether a successive governmental action constitutes punishment within the meaning of the Double Jeopardy Clause. The Court relied on *United States v. Ward*, 448 U.S. 242, 247-48 (1980), which had utilized the considerations listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The Court's reliance on these cases teaches that the *Ursery* approach is not limited to forfeiture or monetary sanction cases.

The legislature's intent to create a civil, nonpunitive, remedial or regulatory measure is evident if the measure or action is facially, nominatively or structurally civil. If the intent or design of the statute was to create a civil, nonpunitive, remedial or regulatory statute, there is a presumption that it is not subject to double jeopardy. *Ursery*, 116 S. Ct. at 2148 n.3. This presumption can be overcome only by the "clearest proof" that the action or measure is nonetheless "so punitive either in purpose or effect" as to be equivalent to a criminal proceeding, a punitive statute that imposes punishment. *Id.* Applying this analysis to sexually violent person commitment statutes, the Court must reach the conclusion that these commitment statutes are not punitive or criminal and do not impose punishment within the meaning of the Double Jeopardy or Ex Post Facto Clause.

The civil, nonpunitive intent and design of the legislative measure or action is clearly demonstrated by the statute itself if the nature and operation of the statute have traditionally been viewed as civil proceedings. *Ursery*, 116 S. Ct. at 2142, 2147-48. Involuntary civil

commitment statutes have historically been viewed as nonpunitive. This Court has stated, "[i]n a civil commitment state power is not exercised in a punitive sense." *Addington v. Texas*, 441 U.S. at 428. The States enacting sexually violent person commitment statutes intended and designed them to be civil commitment statutes.[9]

More importantly, these statutes are comparable to other civil commitment statutes in nature and critical structure. Like other civil commitment statutes, sexually violent person commitment statutes require the State to prove the person suffers a mental disorder and that he is dangerous. Like other subjects of civil commitment, sexually violent person committees are placed in the custody of the department of health and social services, not the department of corrections, for control, care and treatment. Like other civil commitments, sexually violent person commitments are conditioned on the presence of a particular mental disorder. Like other civil commitment statutes, under these statutes the individual is entitled to release when the conditions justifying commitment abate.

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[9]In rejecting Double Jeopardy and Ex Post Facto Clause challenges to Wisconsin's sexually violent person commitment statute (ch. 980, Wis. Stats.), the Wisconsin Supreme Court reviewed the language of the statute itself, the provisions of the statute regarding treatment, the nature and place of confinement and the provisions regarding supervised release, periodic review and entitlement to discharge when the person's mental disorder or dangerousness abates. The court concluded that "[t]he emphasis on treatment in ch. 980 is evident from its plain language" and that the statute's provisions "lead us to conclude that the statute is aimed primarily at treating the sexually violent person, not punishing the individual." *State v. Carpenter*, 541 N.W.2d 105, 110-11 (Wis. 1995). The Washington Supreme Court reached similar conclusions regarding that State's statute. *In re Young*, 857 P.2d 989, 992, 996-1000 (Wash. 1993).

This is the hallmark of a civil commitment statute; punitive confinements do not terminate when the person's mental condition changes. Sexually violent person commitment statutes are like other involuntary civil commitments, and unlike prison sentences, in terms of the justifications for, nature, and duration of confinement. *State v. Carpenter*, 541 N.W.2d 105, 110-11 (Wis. 1995). They are not the "functional equivalent" of criminal proceedings or punishment. *See Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994), *discussed in Ursery*, 116 S. Ct. at 2144.

The nature, structure and design of these commitment statutes evidence clear legislative intent to create civil, nonpunitive, remedial statutes. It is wrong to ignore the plain language of the statutes themselves and to speculate that the "real," and sinister, intent of the legislators enacting such statutes was to prolong detention of sexually violent persons past completion of their prison terms so that they could not reoffend. First, such arguments wrongly equate incapacitation with punishment. "[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Bell v. Wolfish*, 441 U.S. 520, 537 (1979)). Detention of dangerous persons for the purpose of preventing danger to the community is a legitimate regulatory governmental goal that does not constitute punishment. *Salerno*, 481 U.S. at 747. A prime example of nonpunitive detention is the detention of "mentally unstable individuals who present a danger to the public." *Salerno*, 481 U.S. at 748-49 (citing *Addington v. Texas*, 441 U.S. 418 (1979)). If detention for the purpose of preventing the individual from committing harm in the community were necessarily punishment, all involuntary civil commitments would constitute punishment. That is not the law.

More erroneously yet, such arguments confuse legislative intent with motive. This Court has firmly rejected motive arguments:

> Judicial inquiries into [legislative] motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to [the court] forbids [it] lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. "[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void."

Flemming v. Nestor, 363 U.S. 603, 617 (1960). "The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray v. United States*, 195 U.S. 27, 56 (1904). The Court shall not undertake to psychoanalyze the subjective intent of a State's laws or its courts; it would be unseemly, misguided and improper to do so. *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 635 (1988). *See also United States v. O'Brien*, 391 U.S. 367, 384 (1968).

Applying the proper analysis and understanding of legislative intent, there is no doubt that States enacting sexually violent person commitment statutes intended to enact a civil, nonpunitive, remedial or regulatory measure. Thus, such statutes are presumed not to be subject to double jeopardy. *See Ursery*, 116 S. Ct. at 2148 n.3. The only remaining question is whether there is the "clearest proof" that such commitments "are so punitive in form and effect as to render them criminal despite [the legislatures'] intent to the contrary." *Ursery*, 116 S. Ct. at 2148.

If the legislative measure serves important nonpunitive goals, the presumption has not been overcome, even if the measure may perhaps also have certain punitive aspects. *Ursery*, 116 S. Ct. at 2148. For example, even though civil forfeitures inflict a loss of property, the nonpunitive goal of such statutes is to encourage property owners to take care in managing their property and not allowing it to be used for illegal purposes; a forfeiture may also abate a nuisance. *Id.* Similarly, here, although sexually violent person commitment statutes inflict a loss of liberty, the aim of that loss of liberty is remedial, not punitive. Like other civil commitment statutes, the purpose of the confinement is to protect the public from the danger posed by the individual's mental condition and to offer treatment for that condition. Sexually violent person commitment statutes encourage sex offenders to accept and actively participate in the sex offender treatment that is offered in prison so that upon release they will not present a danger to the public that necessitates commitment.[10]

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[10]The Wisconsin Supreme Court rejected the argument that because commitment follows service of a criminal sentence, the statute is not truly intended to provide treatment:

> [W]e note that treatment, even specialized treatment directed toward sexual offenders, is currently available in the regular prison setting. For those who have fully availed themselves of treatment opportunities, a chapter 980 petition may be unnecessary. It is only those for whom previous treatment has proved ineffective, as demonstrated by their current diagnosis of a mental disorder that predisposes them to commit violent acts, that chapter 980 commitment will be appropriate. The focus on current mental condition is designed to afford persons with the most persistent problems the greatest help available. This court fails to see how a statute structured to cover only those demonstrated to be most in need of treatment can be characterized as "not serious" in its pursuit of the objective of providing treatment.

United States v. Halper, 490 U.S. 435 (1989), does not counsel that sexually violent person commitment statutes would be punitive and impose an unconstitutional second punishment even if, in addition to their remedial, nonpunitive goals, they also were deemed to serve either retributive or deterrent purposes. In *Ursery*, this Court unequivocally rejected that reading of *Halper*. *Ursery*, 116 S. Ct. at 2145-46 n.2. Under such a reading, "virtually every sanction would be declared to be a punishment: it is hard to imagine a sanction that has no punitive aspect whatsoever." *Ursery*, 116 S. Ct. at 2146 n.2 The presence of some punitive aspects will not render the statute punitive as long as the statute serves important nonpunitive goals. *Id.* at 2148.

In particular, the fact that the legislative measure is linked to criminal activity does not render the measure punitive, as long as that aspect of the measure serves a nonpunitive goal. For example, the fact that a forfeiture applies to proceeds of illegal conduct does not render the forfeiture punishment for the conduct because the forfeiture "serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts." *Ursery*, 116 S. Ct. at 2148-49. Similarly, the fact that sexually violent person commitment statutes apply to persons who have committed serious sexual offenses does not mean the goal of the commitment is to punish the person for that act. Rather, the requirement of a criminal offense as a prerequisite to commitment serves the nonpunitive goal of ensuring that only the most dangerous, sexually disordered persons can be committed. The fact that sexually violent person commitment statutes apply to

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State v. Post, 541 N.W.2d 115, 125 (Wis. 1995). The court also found support exists for the legislature's conclusion that effective treatment of sex offenders that can reduce sexual violence does exist, and acknowledged the specialized treatment to be afforded persons committed under the Wisconsin law. *Id.* at 125.

persons who have served prison terms does not mean the goal of the commitment is to punish the person by essentially lengthening the prison term. Rather, application of the statute to such persons targets the statute to those who are most dangerous because they have been offered sex offender treatment in prison and have rejected it or who evidence substantial likelihood to reoffend because the prison experience has not had a deterrent impact on them. Thus, the fact that sexually violent person commitment statutes are "tied to criminal activity" is "insufficient to render the statutes punitive." *Ursery*, 116 S. Ct. at 2149. Similarly, even if these commitment statutes may be said to also serve the purpose of deterrence, that does not render them punitive because civil, as well as criminal, statutes may serve deterrent goals and the deterrent purpose is distinct from any punitive purpose. *Id.*[11]

Ursery teaches that a statute is not punitive merely because it has some punitive aspect, because it serves a deterrent purpose, or because it is linked to criminal conduct. *Ursery* properly focuses the analysis on whether the statute serves important nonpunitive goals. If it does, the presence of other factors will not render the statute punitive. *Ursery* clarifies that the controlling question asks whether a nonpunitive purpose to which the legislative measure may rationally be connected is assignable for the measure and whether the measure appears excessive in relation to that nonpunitive purpose.[12] That approach is

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[11]*Ursery* also noted that civil forfeiture statutes do not require the government to show scienter in order to establish that the property may be forfeited. *Ursery*, 116 S. Ct. at 2149. Similarly, sexually violent person commitment statutes do not require a showing of scienter.

[12]In *Ursery*, the Court drew on the factors it had previously identified in *United States v. Ward* and *Kennedy v. Mendoza-Martinez* as useful in determining whether governmental

equivalent to the approach in *Bell v. Wolfish*, 441 U.S. at 538-39, in which the Court indicated that if the challenged governmental action (here, involuntary commitment) is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. Only if it is arbitrary or purposeless in relation to the nonpunitive goal may the Court infer that the purpose of the governmental action is punishment. *Id.* at 539. Only if it is arbitrary or purposeless and serves no legitimate nonpunitive goals does the governmental conduct constitute the kind of governmental oppression the Double Jeopardy Clause forbids. Only if it is arbitrary or purposeless and serves no legitimate nonpunitive goals does the statute create the kind of arbitrary and vindictive law the Ex Post Fact Clause prohibits.

Sexually violent person commitment statutes serve the important and legitimate nonpunitive governmental goal of incapacitating dangerous, mentally disordered persons for the purpose of protecting the community and providing treatment to the disordered. *See Addington v. Texas*, 441 U.S. at 426; *United States v. Salerno*, 481 U.S. at 748-49. Commitment under these statutes is reasonably related to the goals of incapacitation and treatment. Commitment cannot be said to be arbitrary or purposeless in relation to these nonpunitive goals because the States have demonstrated that mental disorders or abnormalities that render offenders particularly likely to commit acts of sexual violence can be identified and the likelihood that a particular individual will engage in acts of sexual violence, if not committed, can be predicted with sufficient accuracy

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conduct is impermissible punishment. *Ursery*, 116 S. Ct. at 2148-49. *Ursery* advances the inquiry, however, by clarifying the relative weight of the different factors. *Ursery* holds that the presence of punitive or deterrent factors will not make the statute punitive if the statute has a nonpunitive purpose and its provisions are reasonably related to and not excessive in light of that purpose. *Id.*

that the confinement cannot be said to be arbitrary. *See State v. Post*, 541 N.W.2d 115, 122-24, 126 (Wis. 1995) ("mental disorder" in sexually violent person commitment statute can be given reasonably precise content and persons it encompasses can be identified with reasonable accuracy; although predictions of future dangerousness may be difficult, they are nonetheless attainable); *see also In re Young*, 857 P.2d 989, 1001-04 (Wash. 1993). Treatment for such disorders is available and release is required when the dangerous mental condition abates; thus the commitments cannot be said to be purposeless and it cannot be said that the commitments are excessive in relation to these nonpunitive purposes.

There is no "fundamental principle of justice" or historical practice that compels the conclusion that the States may not first punish all guilty sex offenders because they are culpable actors and then civilly commit those with mental disorders who are predisposed to commit acts of sexual violence and who are particularly dangerous because they have failed to successfully complete treatment or have not been deterred by the prison experience. *See Montana v. Egelhoff*, 116 S. Ct. 2013, 2019 (1996) ("It is not the State which bears the burden of demonstrating that its rule is 'deeply rooted,' but rather [the challenger] who must show that the principle of procedure *violated* by the rule (and allegedly required by due process) is '"so rooted in the traditions and conscience of our people as to be ranked as fundamental"'"). Historically, there has been no consensus on how mentally disordered persons who commit acts of sexual violence should be treated. *See* Albert Deutsch, *The Mentally Ill in America: A History of Their Care and Treatment From Colonial Times*, Columbia University Press (1949); Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 Mercer L. Rev. 889 (1995). Today, there is no consensus among the States as to how people with mental disorders who commit criminal acts should be dealt with in

terms of culpability and responsibility or ability and willingness to control behavior. This lack of consensus and lack of consistent historical practice does not mean that the States cannot enact the type of statute at issue here: it means the courts should not override the States' choice.

Critics of these statutes contend that commitment is not a legitimate nonpunitive goal because it prevents the person from committing a crime while confined, just like incarceration in prison does. But this argument wrongly assumes that any attempt to eliminate a harm to the community is punishment. *See DeVeau v. Braisted*, 363 U.S. 144 (1960) (governmental purpose to eliminate corruption on waterfront which included removing exfelons from position of influence was not punishment).

Sometimes whether a legislative measure or governmental action is punishment or not determines whether certain constitutional or procedural due process rights must be afforded. *See, e.g., Allen v. Illinois*, 478 U.S. 364 (1986). *Allen* held that a sexually dangerous person commitment statute, which is civil in nature and design, is not rendered criminal or punitive because the State elects to provide the subject with procedural safeguards like those afforded to criminal defendants, because commission of a sexual crime is a prerequisite to applicability of the statute, because the statute imposes a loss of liberty or because commitment might be to a mental health facility operated by the department of corrections that also houses prisoners in need of mental treatment. None of those attributes rendered the Illinois statute criminal or punitive; none of them render the sexually violent person commitment statutes at issue here criminal or punitive. Indeed, the States should be lauded for providing additional procedural protections because such protections ensure reliable decisions. Moreover, procedural due process protections (including jury trials, right to counsel and proof beyond a reasonable doubt) protect against arbitrary and oppressive governmental conduct. *See Joint*

Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring) (procedure spells much of the difference between rule of law and rule by whim or caprice; "[s]teadfast adherence to procedural safeguards is our main assurance that there will be equal justice under law").

This Court must reject the argument that, although *Allen*-type statutes that impose commitment in lieu of prison are not criminal and do not impose punishment, statutes like the one at issue here, which permit successive punishment and commitment, are. That argument finds no reference point in any constitutional principle. No such rule can be predicated on this Court's statement in *Allen* that, under the statutory scheme at issue there, the State had "disavowed any interest in punishment." *Allen*, 478 U.S. at 370. The Court's description of the *Allen* statute is equally applicable here: neither the *Allen* statute nor the Kansas-type statute embraces an interest in punishment as a justification for the involuntary civil commitment. That description of the statute in *Allen* is not a holding that a State must disavow any interest in punishment--in the sense that it may not first punish the person in the traditional manner--in order to constitutionally commit dangerous, sexually disordered persons.

This Court can invalidate the States' sexually violent person commitment laws only if such laws violate a clear constitutional guarantee. This Court is the ultimate arbiter of constitutional law; it is not the ultimate arbiter of how States should best deal with the complex problems presented by those who commit crimes who also suffer mental disorders that make them especially dangerous to the community. The boundaries of this Court's role are critical. If the Court is wrong and oversteps its boundaries, the nation, and its people, suffer in a way that is far more fundamental and that extends far beyond the context of these cases.

The Double Jeopardy Clause and the Ex Post Facto Clause exist to protect the individual against governmental oppression. Absent such oppression, the Constitution does not prohibit the States from utilizing a variety of measures designed to protect the community from dangerous, mentally disordered persons. Sexually violent person commitment statutes do not amount to governmental oppression because they are civil measures that serve traditional, legitimate, important and nonpunitive purposes--incapacitation and treatment of the dangerous, mentally disordered. Their provisions reasonably relate to those purposes and are not excessive in relationship to those purposes. Sexually violent person commitments are not so punitive in purpose or effect as to be considered punishment or criminal for purposes of the Double Jeopardy or Ex Post Facto Clause. They are constitutional and must be upheld.

CONCLUSION

The judgment of the Kansas Supreme Court should be reversed.

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